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IN THE

Supreme Court of the United States

NO. ~~971~~ 120

TREADWELL CONSTRUCTION COMPANY,

Petitioner

V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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Petitioner, Treadwell Construction Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit rendered in the above entitled case on February 15, 1962.

JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by 28 U.S.C. 1254.

OPINIONS BELOW

The oral opinion of the District Court is printed in Appendix A hereto attached. This opinion was not reported. The opinion of the Court of Appeals for the Third Circuit printed in Appendix A herein included is reported in 299 F. 2d p. 789.

QUESTION PRESENTED

Does Section 7(b), which was added to the Federal Employees' Compensation Act in 1949 (63 Stat. 861, 5 U.S.C. Sec. 757(b)), withdraw the consent which the Tort Claims Act provides relative to the imposition of tort liability upon the United States where the claim is asserted in the interest of a tortfeasor found to be jointly negligent with the United States in causing injury?

STATUTE INVOLVED

The Statute involved is the Federal Employees' Compensation Act, 5 U.S.C. 751, et seq. The pertinent provision is as follows:

5 U.S.C. 757(b) "The liability of the United States or any of its instrumentalities under Section 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or any Federal tort liability statute . . ."

STATEMENT OF THE CASE

This action was instituted originally by Joseph Drake against Treadwell Construction Company for injuries he sustained when a certain pressure tank on which he was working exploded. The tank was manufactured by Treadwell. Drake was a civilian employee of the Ordinance Department of the United States Army. While performing his duties at the Ordinance Department's Watertown Arsenal in the State of Massachusetts, Drake was performing a pressure test on the tank which was part of the equilibrator system of the Army's 280 millimeter atomic cannon. The carriage for the atomic cannon, of which the tank was a part, was manufactured by Treadwell. Drake received severe injuries in the explosion.

Treadwell impleaded the United States a third party defendant for contribution or indemnity. Judgment was entered in favor of Drake against Treadwell for $180,000.00. On the third party claim, the District Court found the United States also negligent, and ordered contribution in favor of Treadwell against the United States for one-half the verdict. The findings of the District Court upon which it based its decision were fully set forth in the opinion printed in Appendix A hereto. (p. 1a) The Court of Appeals for the Third Circuit reversed the District Court, holding that the claim against the United States was barred by the terms of Section 7(b) of the Federal Employees' Compensation Act (5 U.S.C. 757 (b)). The Court of Appeals held that Section 7(b) withdrew any consent to civil liability given by the United States.

The Petitioner has paid to the plaintiff, Drake, a total of $156,815.03. This amount represents the difference between the $180,000.00 verdict and $23,184.97 which the plaintiff had previously collected from the United States in the form of compensation. Your Petitioner is not attempting to collect from the United States beyond its statutory compensation liability.

REASONS FOR GRANTING THE WRIT

I.

The same question as here involved is presented in a case presently pending before this Court: *Weyerhaeuser Steamship Company v. United States of America* at No. 674 October Term, 1961. The *Weyerhaeuser* case from the Ninth Circuit and this case at bar before the Third Circuit are the only Federal Appellate Court decisions involving Section 7(b) as to this particular feature. Since the *Weyerhaeuser* case from the Ninth Circuit is to be considered by this Court, we feel it necessary that the Third Circuit opinion in this case at bar be also reviewed. The Third Circuit opinion cited the *Weyerhaeuser* case as authority.

II.

A. The United States is definitely liable under the act for the compensation to be paid to an injured Federal employee. Under the interpretation of the Third Circuit, this compensation liability need not be paid by the United States although granted by the Statute, but, in effect, is paid by the third party involved, who is the joint tort-feasor with the United States in causing the injury. It is highly unjust and unfair to charge a third party joint tort-feasor with the full payment of the amount which the United States is liable for under the Federal Employees' Compensation Act.

B. Congress did not intend to make the third person, unfortunate enough to injure a beneficiary of the Federal Employees' Compensation Act, the gratuitous statutory indemnitor of the Federal Government. The

effect of the decision of the Third Circuit is to make a third party tort-feasor an indemnitor of the United States. In the case at bar, there was a finding of negligence on the part of the United States and the Petitioner. Under the terms of the Compensation Act, the United States, as the employer, is liable to an injured employee without any showing of negligence. The Third Circuit now holds that even with a showing of negligence, the United States can escape liability, provided there is a *joint party* tort-feasor involved. When this is the case, the third party must bear the load. In fact, if the employee neglects or refuses to pursue his remedy against the third party, the United States, even though negligent itself, can enforce the claim against the third party on behalf of the employee. 5 U.S.C., Section 776. Such a result can hardly be said to be the true intent of Congress in passing the Federal Employees' Compensation Act.

Because of the patent inequities of the doctrine as set forth by the Court of Appeals, and because of the impact this decision will have on any person dealing with an employee of the United States, this Court should grant certiorari.

III.

The Court of Appeals has decided that "exclusive liability" provisions of the Federal compensation legislation bars recovery by a third party against the United States who has been found jointly negligent with the United States in producing the injury. Legislative history never intended such an interpretation. The legislative history of the 1949 Amendment to the Federal Employees' Compensation Act shows a complete absence of

any intent on the part of Congress to reach the result which has been reached by the Third Circuit in this case. S. Rep. No. 836, 81st Cong., 1st Sess., H. Rep. No. 729, 81st Cong., 1st Sess. The express intent of Congress was to prevent employees of the United States from bringing actions under other Federal Statutes such as the Tort Claims Act and the Admiralty Act. Prior to the 1949 Amendment, a Federal employee had a choice of remedies, namely, he could accept compensation under the terms of the Compensation Act, or sue the United States under any other applicable Federal Statute which withdrew sovereign immunity. *Parr v. United States*, 172 F. 2d 462, Tenth Circuit, (1949). That this was the state of the law prior to the Amendment was recognized by this Court in *Johansen v. United States*, 343 U.S. 427 (1951). It was stated by this Court:

> "Prior to 1949, there was a divergence of view in the Courts as to the exclusiveness *vel non* of the remedy of compensation. This uncertainty extended to suits by Government Seamen seeking damages under the Public Vessels Act. The purpose of the 1949 Amendment is simply to make it clear that the right to compensation benefits under the Act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities."

The "exclusive remedy" as used in the Act can be interpreted in light of the above authority to mean only that remedy of a United States employee is exclusively confined to the Compensation Act. Any other interpretation would be in conflict with the expressed intent of the Legislature.

IV.

The Pennsylvania rule relative to workmen's compensation is a much more equitable interpretation. The Pennsylvania practice provides that a negligent employer who is jointly liable with the third person in producing the accident, is liable for *at least the amount of its compensation liability,* but not in excess of its proportionate share of the verdict. The Petitioner does not assert that Pennsylvania law is in any way controlling in the case at bar. We would, however, like to draw this Court's attention to the law of Pennsylvania, which we submit is a much more equitable and realistic approach to the problem.

See *Maio, Executrix v. Fahs et al.,* 339 Pa. 180; *John W. Brown Equipment Rental Corporation v. Dickey,* 397 Pa. 454; *Shaull v. A. S. Beck New York Shoe Company,* 369 Pa. 112.

In Pennsylvania, contribution can be obtained from a negligent employer up to an amount which he would have been liable for under the terms of the Pennsylvania Workmen's Compensation Act. In other words, under the Pennsylvania rule, an employer is still given the protection of the Compensation Act while the third party's right of contribution is not taken away.

In the case at bar, the total possible liability of the United States to the injured employee, Drake, is an amount in excess of the Petitioner's claim for contribution. This, we submit, is an important factor to be taken into consideration when considering the theory of Workmen's Compensation Acts in general as well as the legislative intent in enacting them.

CONCLUSION

In order that this Petitioner may have the same protection as the Petitioner in the *Weyerhauser* case, in which certiorari has been permitted, it is respectfully suggested that certiorari be likewise issued in this case. The same question is involved.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH DRAKE, Plaintiff
v.
TREADWELL CONSTRUCTION COMPANY, Defendant and Third Party Plaintiff
v.
UNITED STATES OF AMERICA, Third Party Defendant

Civil Action No. 14517

Oral Opinion

Friday, November 18, 1960

* * * * * * *

The Court: I think the court is in a better position to determine this case at this minute than it will ever be, because if I would afford counsel for the parties the opportunity to submit findings of fact and conclusions of law, and set the matter for argument it would be necessary for the trial judge to refresh his mind and read this complete record to evalute the merits. It is very clear in the court's mind at this minute, having been engaged in the trial of the proceedings since Monday of this week—this is Friday. I will therefore enter an oral opinion.

In this proceeding, Joseph Drake, a member of the Ordnance Department of our government, was severely and permanently injured on April 14, 1954 while employed as an artillery assembler by the United States Army at its Watertown Arsenal in the State of Massachusetts, and was therefore lawfully on the premises in

the performance and furtherance of his duties at the time of his injury and the accident which gave rise to this action.

It is not in dispute that the Treadwell Construction Company, who was originally sued at this civil action number by Joseph Drake, entered into contract to manufacture on the basis of specifications submitted by the government through its Ordnance Department to the Treadwell Construction Company, in the opening of a new field for a military weapon in which the research, at least as far as the drawing board was concerned, was first considered by the government during the end, or a short time after the Second World War; that great research and study was made of the production of the atomic cannon or gun, and this study on the part of the government culminated in a most careful evaluation by the Franklin Institute, in which men specially trained in this particular field most carefully reviewed the various problems that existed. In drawing upon their expert knowledge and know-how, it was first decided to manufacture a 240-millimeter atomic weapon, but it was subsequently determined it was not practical, and finally resolved that the atomic weapon would be identified as a 280-millimeter atomic weapon.

Considerable research and study was given as to the type of steel that would be used, and it was agreed by those distinguished gentlemen who studied the problem at Franklin Institute, among which representatives of the Ordnance Department participated, that 4140 steel should be used in the expansion tank, for the reason it had a higher strength, it was suitable for welding if properly welded, this type of steel would keep the weight

of the tank down, and it was more available on the market.

Subsequently it was determined that the 4140 steel was found to be at a premium in some parts of the country, and it was therefore determined that Class B Grade 2 steel forged would be approved as an alternate steel. This steel was not as strong as 4140 steel, but it was suitable for use; with the use of the Class B Grade 2 steel forged, a greater amount of steel was required to be used, which would make the instrumentality heavier than the weight of the instrumentality using the 4140 steel.

The contract, as I heretofore stated, was approved, and one of the manufactures—I mean the adoption of this atomic weapon with 4140 steel was approved by Ordnance, and the atomic weapon was to be made through four sources; one through the representatives of Ordnance at Watertown Arsenal, two other manufacturers not concerned in this proceeding, and the Treadwell Construction Company, who is the defendant in this civil action number.

The court engaged in the administration of the trial of this case for approximately three days with a jury, and at the end of the plaintiff's case the defendant and the plaintiff withdrew their right to trial by jury and agreed to submit the disposition of the case to the court based on plaintiff's testimony, and the defendant Treadwell Construction Company elected to offer no testimony.

During the whole of the trial of the case, government counsel was present in the courtroom, seated at a counsel table approximately 12 to 15 feet from defend-

ant's counsel table. He took notes throughout the trial of the case and was present every minute of the trial, but I could not permit him to sit at counsel table with the counsel for the Treadwell Construction Company, for the reason that I was required to try the case of Joseph Drake based on the pleadings of plaintiff against Treadwell Construction Company with a jury.

After the filing of the action of the plaintiff against the defendant, the Treadwell Construction Company caused to be brought upon the record as a third party defendant the United States of America.

Under the provisions of law, the court had no right or any discretion to have administered by jury trial the action of the Treadwell Construction Company, defendant and third party plaintiff, against the United States of America, third party defendant.

After evaluation of all the testimony offered in the action of Joseph Drake against Treadwell Construction Company, the court was convinced without any mental reservation in any way whatsoever, that the plaintiff Joseph Drake had established by the fair preponderance of the weight of all the credible evidence that the defendant Treadwell Construction Company was guilty of acts of negligence which were the proximate cause and a substantial contributing factor in bringing about the accident.

The court is further of the view that there was no evidence in the case which would tend to establish that Joseph Drake was guilty of any act of negligence, regardless of how slight, which directly or indirectly or in any way possible engaged in any course of activity which contributed to the accident.

The court therefore entered judgment in favor of Joseph Drake and against Treadwell Construction Company of liability, for the reasons that I just stated.

The court has never seen a plaintiff who was more conservative, more reluctant to enlarge upon the injuries and extreme suffering that he was caused to experience. In my judgment, he was one of the most conservative plaintiffs I have ever heard testify. He impressed the court as being honest and sincere. He served his country well in the Marine Corps without any advent or fortuitous experience as far as being wounded or injured is concerned. He had before him a most pleasant life; he was competent and capable in the administration of his work, and having lost one of his legs with a stump which the court has seen, which is little or of no value to him, having partial impairment in the use of one of his arms for all practical intents and purposes, he was what we would call a nondescript; he could only do desultory things. Work would have to be made for him in which all he could do is sit. In our economic world of today he could not secure a job, never will secure a job in my judgment, unless some person out of the graciousness of his heart sees fit to give him a job where he just sits, and that is a very conjectural possibility.

In view of his medical and hospital expenses, and his loss of wages to date, his potential life—he was a strong-looking man—the permanent impairment of earning power, and his pain, suffering and inconvenience, this court felt $180,000 was a fair and reasonable verdict, and entered judgment for that amount, in favor of Joseph Drake, plaintiff, and against the Treadwell Construction Company.

After the completion of that trial, the court immediately proceeded to the trial of the action of Treadwell Construction Company, defendant and third party plaintiff against the United States of America, third party defendant, this practice being followed for the reason it was required under the Act of Congress, and this action had to be tried separate and apart from the original claim.

The court spent approximately two days hearing the testimony offered by the plaintiff and the cross examination of the defendant. I thought it would just be a waste of time, laboring the court and counsel by requiring the various witnesses to come back again and be asked the same questions and make the same answers as were heretofore made by the witnesses when called in plaintiff's case.

We are one of the busiest courts in the United States. We are trying civil jury cases which are three to four years of age. We are criticized in the halls of Congress for our back-log of cases, and in the exercise of my best judgment and discretion I felt it proper, on the motion of counsel for Treadwell Construction Company, to incorporate, I felt it possible on the request of counsel for Treadwell Construction Company, who stated to the court that he desired to adopt the testimony of the plaintiff as his own testimony, plus the cross examination of the witnesses as his own testimony, but government counsel objected to the cross examination being incorporated as part of Treadwell Construction Company's testimony. I conscientiously and sincerely felt the government's objection was not well taken, and I think I am confirmed in my conclusion when consideration is

given to the few number of questions that counsel for the government asked Dr. Warner when he was called back to the witness stand. No useful purpose could be gained in my trying this case without a jury, to require counsel for Treadwell Construction Company to ask in substance the same questions that were asked the witnesses called by the plaintiff under cross examination. As my learned members of the judiciary sitting on appellate courts fully realize, it doesn't make any difference to a trial judge the manner or method questions are asked when you are trying a case without a jury. It would have been just a waste of time in laboring this court with an aspect of technical procedure which would make no practical difference in any way whatsoever in the ultimate determination of this case.

The court afforded counsel for the government the right to call any witnesses he wished, to ask any questions that he wished of any witness that was called by the plaintiff and cross examined by the defendant if he so desired, and the record speaks for itself as to what witnesses he elected to call to follow that procedure.

There is no question in my mind that this 4140 steel was not suitable for the hazardous purposes to which this military vehicle was to be applied. There is no question in my mind that welding processes although acceptable in commercial use, could be used with 4140 steel, it appears to me that when the question that existed, at least to a limited extent as to the problems that had arisen in the past and could have arisen, and did arise in the manufacture of an instrumentality of this nature to be used in our military forces, that the approval of 4140 steel did not meet the burdens which the government

should have applied in seeing that a military instrumentality would not be subjected to the possibilities which this vehicle was, because the government should have anticipated that in the field of battle so many, many factors arise that it could have been reasonably concluded that the 4140 steel and the weld applied thereto was not suitable and fit for military instrumentality of this nature.

However, as a matter of law I do not think the government is liable for the steel decision that was made. I believe that the determination of the type of steel to be used was the discretionary function or duty in this program that was new, was blazing a trail as to a new type of weapon that was needed for the preservation of this democracy and to properly equip our armed forces; it included determinations made by executives and administrators of Ordnance in establishing plans and specifications, plus their subordinates of the heads of Ordnance, in the preparation of the detailed specifications that would be used in the manufacture of the component parts of this weapon.

Under the provisions of this Act of Congress, more particularly 28 U.S.C.A. Sections 1346, et seq. and 2680, 2671-78 et seq., Congress has seen fit to provide that the government is not liable for negligence or carelessness in the exercising or performance, or the failure to exercise or perform a discretionary function or duty on the part of any federal agency, whether or not the discretion involved is used.

I don't think there is any question but what this weapon and its component parts, more particularly the part that gave rise to this accident, was manufactured

according to the specifications and plans under the control of the United States, and that the administration of the contract was to be carried on through the Army Bureau of Ordnance, so the court is making no finding as to liability of the government in any way whatsoever as to the type of steel used in this contract.

We come to the other provisions of the Act as evaluated by testimony in this case, and it must be kept in mind that without any consideration of discretion, plans or specifications, 28 U.S.C.A. Section 1346(b) says—I am improvising, or paraphrasing would be a better word —the United States shall be liable for money damages for injury or loss of property, or personal injury caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United StaStes as a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Under the decisions, a defendant tort-feasor has the same right as the plaintiff against the government if the person injured was injured due to the joint and concurrent or separate acts of negligence of the defendant and the United States. There is much well written authority that holds to that view; in fact, the Supreme Court of the United States has so ruled.

The Federal Tort Claims Act was not an isolated and a spontaneous flash of Congressional generosity. From a reading of the Congressional Record and the legislative history, it marked the culmination of a long effort on the part of the members of Congress to mitigate and do away with unjust consequence of sovereign immunity to suit.

Appendix A—Oral Opinion.

As the learned Justice Jackson said in discussing this Act—I am much impressed with his comment—surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that the king can do no wrong has not been uprooted; that doctrine then would be merely amended to read, the king can only do little wrongs; and certainly in the interpretation of this Act, no court could reasonably conclude that if the government is liable for negligence of its employees in operating a mail truck, or an Army officer a motor vehicle, or a pilot a jet airplane, it would certainly seem reasonable to me where the government is guilty of acts of omission or commission in its representative supervising the performance of a contract for the manufacture of an atomic weapon, that the government should be held responsible for said acts of omission or commission, because the discretion has already been exercised.

The government has exercised its discretion in deciding what type of steel is to be used here, and when inspectors are asked and directed to observe whether or not a contract is or is not being properly performed for an instrumentality such as an atomic weapon, there is no discretion on the part of said employee. They have a mandatory duty to see that an instrumentality is not placed together through its composite parts and placed on the field of battle where innocent doughboys or men serving in our armed forces can be subjected to destruction and annihilation not from the cause of the enemy but through the negligence of employees of the Ordnance Department of the government.

Appendix A—Oral Opinion.

It is my considered judgment that the Treadwell Construction Company beyond a reasonable doubt, not preponderance of the evidence—I have no reservation, no doubt that Treadwell has proved by more than the preponderance or the weight of all the credible evidence, that the United States of America was negligent both by acts of omission and commission which brought about this accident to Joseph Drake, through the joint, concurrent negligence of Treadwell Construction Company and the United States of America, with no relationship in any way whatsoever in what I have just stated to any acts of discretion existing on the part of the government.

The government negligence was not in policy decisions of a regulatory or governmental nature. The negligence of the employees of the government is akin to that of a private manufacturer or private individual who most negligently and carelessly carried out the functions and duties assigned to them in the production of this great atomic weapon.

I can find no basis or any reason to stretch the legislative text of this Act to immunize the government from responsibility for its acts where its acts are not performed and done with appropriate care for the safety of others.

The following acts of negligence are found on the part of the government which in my judgment were the proximate cause of the accident and substantially contributing factors to bring about the accident. I reach this conclusion for the reason that the acts of negligence which I am about to enunciate. in my considered judgment arose after the government had exercised its discretion.

The contract provided under "Inspection," 5(e), "The Contractor shall provide and maintain an inspection system acceptable to the government covering the supplies hereunder. Records of all inspection work by the Contractor shall be kept complete and available to the government during the performance of this ocntract and for such longer period as may be specified elsewhere in this contract."

It is not in dispute that this paragraph is the only provision in the whole and complete contract which relates to the inspection requirements to be applied by the government and by the representatives of Treadwell Construction Company, and the phrase in 5(e), ". . . for such longer period as may be specified elsewhere in this contract." there is no other provision in the contract, so that phrase may be deleted therefrom, because there is no other provision in the contract requiring ". . . for such longer period as may be specified elsewhere in this contract."

I am satisfied that this welding was a most complex problem. It required and called upon the ingenuity of men specially trained in this field to know that the weld was proper, suitable and fit for the purposes and the hazards for which this weapon would be placed in its use.

There is a rule of law that if witnesses are not called who could extend help to the trier of the facts, and said witnesses are under the control of the party who does not call them, and there is no explanation made as to why said witnesses are not called, an inference can be drawn by the fact finder that if the witnesses had been called, or the evidence presented, the testimony would have been

unfavorable to the party who would have called them. I think that rule of law has great application in this case, and I am going to apply it in part.

I have never heard a witness on the stand who is a man of scientific knowledge and background, who impressed the court more than Dr. Warner. I think he was honest, sincere, thorough, and spoke the realities of his full and complete knowledge without any consideration in his mind as to whether it would hurt him or help him, or who it would hurt or help, and that is the type of witness we need in a court of justice.

I am satisfied that it was settled practice in the Ordnance Department before Treadwell started the production of this atomic weapon, that the inspectors in the Ordnance Department knew and had knowledge of and generally followed the custom, before a weld was inspected, to clean the weld by sandblasting or shot-blasting, and then to use a magnifying glass to see if there was a crack in the weld before magnafluxing was ever applied. Dr. Warner in my judgment certainly knows that of his own knowledge.

Then we come to a point where the government sent a chief inspector to the Treadwell Construction Company. He is there for a few weeks, three or four, five weeks, then is sent to the Ordnance Department Watertown Arsenal I think for training. He certainly had that training, based on Dr. Warner's testimony. If he didn't, the government should have called a witness to dispute what Dr. Warner said, or called this agent to deny what Dr. Warner said; he was sitting in the courtroom, which they didn't.

Therefore, I conclude that the reasonable inference deducible therefrom is that this chief inspector of the government had that training when he was sent to the Arsenal; that he knew these welds should be sandblasted or shot blasted before they were inspected; that he knew that a magnifying glass should have been used to determine whether or not there was a crack in the weld, and that his failure to require the inspectors of Treadwell to use a magnifying glass, and his failure to require sandblasting or shot blasting before the magnifying glass was used, was an act of negligence on the part of the government which contributed to and was a substantial factor in bringing about this accident.

I further conclude that the agents of the government took an active part in the inspection and the operation of this program in the manufacture of this atomic cannon; that the inspectors for the government conferred and consulted with the inspectors of the defendant Treadwell for the reason that they were dealing with a new item, a new project, something in which in one sense of the word they were blazing the trail, drawing upon the knowledge and the capabilities that each had, to come up with a sensible and logical and concrete answer as to what wisdom and intelligence should be applied to the various problems that would arise in the manufacture of this most important military instrumentality; and that they were active in this inspection process; that they placed a powder on top of this weld, which shows activity on their part, and they were just not standing by watching; and that their whole course of activity indicates to me beyond any question of doubt that they participated actively in the inspection of this particular type of tank.

I am satisfied beyond any question of doubt that this tank had a defect in the toe of the weld at the time it passed through the assembly line at Treadwell.

I am satisfied beyond any question of doubt that if the weld on Tank 60 had been properly inspected and properly magnafluxed with due consideration being given by the government inspectors, since some of them placed at least the red powder on the area of the weld, that the government representatives or inspectors would have seen this defect, and that therefore the government agents were negligent in not properly supervising the inspection of the magnafluxing of the weld; and that this is not a discretionary act, it is a demanding requirement under the contract that the contractor Treadwell shall comply with all the terms and provisions thereof, and manufacture an article that would be suitable and fit for military service.

Therefore the duty was absolute on the part of the government agents, nothing discretionary, to make positive that Treadwell manufactured a tank that was used on this atomic weapon that would be suitable and fit for the purpose intended, and comply with all provisions of the contract, and that this negligence on the part of the government agents constituted a substantial act of negligence which was a proximate cause and a substantial contributing factor, along with the concurring negligence of Treadwell in bringing about this unfortunate and catastrophic accident to Mr. Drake.

In addition thereto, this atomic weapon after it left Treadwell—and I believe both Treadwell and the government were negligent in permitting it to leave there in the condition it was in—it was inspected and shot

for testing purposes at various places, among which was an area in Canada where the temperature went to many degrees below zero; that this condition and the general course of conduct of this instrumentality could not have been and was not in any way controlled by Treadwell Construction Company; they had no right, they had no authority to limit in any way whatsoever what the Ordnance Department or the Army did with this weapon after it left Treadwell. It stands to reason it was subjected to many, many factors, many, many uses, many, many tensions, many, many pressures over which Treadwell Constructed Company had no control in any way whatsoever, and I am firmly satisfied and convinced that after the weapon had been subjected to these tests, it was not in the same condition as it was when Treadwell deliver d it to the United States of America

Having been through this test shake-down cruise so to speak, when the weapon was brought back to the governmental arsenal in Massachusetts, the heads of Army Ordnance and military forces of our government certainly had some requirement and some duty and some obligation to any person who would have occasion to work on that instrumentality. A most thorough inspection and evaluation should have been made of this atomic weapon before any employee of the government or any other person was permitted to touch that instrumentality or to do anything to it in any way whatsoever, due to the uses and experience which it unquestionably had during the shake-down cruise, if I may use that naval term.

Appendix A—Oral Opinion.

The government of the United States in permitting Joseph Drake to work on the tank of this instrumentality without having had it thoroughly inspected and evaluated before Joseph Drake was permitted to run the test which he was directel to do ~~as~~ this particular tank, followed a course of conduct in my judgment which establishes gross negligence on the part of the United States of America in directing and permitting Joseph Drake to do any work around that tank, or any other employee of the government or any other person, to do any work around that gun without first having had a thorough inspection and evaluation made as to whether or not the work could be done without hazard or a catastrophe arising.

Poor Joseph Drake says, "I put in the oil as I was accustomed to do; I put in the nitrogen, and I wake up in a hospital with my leg off, with my arm paralyzed."

It is a situation which in my judgment res ipsa loquitur applies. It speaks for itself that the government was guilty of negligence, because he was doing his work in the ordinary fashion, he was doing nothing directly or indirectly which in any way brought about the situation which arose, and I therefore conclude as a matter of law that the United States of America was guilty of gross negligence in not properly inspecting and evaluating all aspects of this instrumentality before Joseph Drake was directed to perform any work or carry out any duties relative to this tank.

I therefore conclude as a matter of law that the Treadwell Construction Company has proved by the fair preponderance or the weight of all the credible evidence, that the United States of America was guilty of

negligence which was the proximate and concurring cause of this accident, along with the negligence of the Treadwell Construction Company.

I therefore enter the following judgment.

I order that judgment be, and the same here entered, in favor of Joseph Drake, plaintiff and against the defenant Treadwell Construction Company, defendant, in the amount of $180,000 together with costs; and it is further ordered and adjudged and decreed that the defendant Treadwell Construction Company and the third party defendant, the United States of America, are joint and concurrent tort feasors, whose joint and concurrent negligence was the proximate cause of this accident, and that the right of contribution exists in favor of the Treadwell Construction Company and against the United States of America, and the said Treadwell Construction Company may hereafter have judgment against the said United States of America for the amount which the Treadwell Construction Company proves it has paid to the plaintiff Joseph Drake in excess of the sum of $90,000.

I will direct counsel for the plaintiff to submit appropriate findings of fact and conclusions of law to the court in connection with the oral opinion entered, on or before December 12, 1960.

* * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,591

JOSEPH DRAKE, Plaintiff
v.
TREADWELL CONSTRUCTION COMPANY,
Defendant and Third-Party Plaintiff
v.
UNITED STATES OF AMERICA,
Third-Party Defendant, Appellant

Appeal From the United States District Court for the Western District of Pennsylvania

Argued October 16, 1961.
Before: KALODNER, HASTIE and GANEY, *Circuit Judges*

Opinion of the Court

(Filed February 15, 1962)

BY HASTIE, *Circuit Judge.*

This litigation began as a diversity suit in which the plaintiff, Joseph Drake, an employee of the United States, sued the principal defendant, Treadwell Construction Co., for negligent injury suffered when a steel expansion tank, manufactured by Treadwell for the United States, exploded while Drake and others were testing ordnance at a government arsenal. Treadwell then brought the United States into the suit by filing a third-party claim against the government for indemnity or contribution.

The trial of the principal claim resulted in a finding that the tank had been negligently fabricated and a recovery of damages by Drake against Treadwell. On the third-party claim the court found that negligence by the United States was also a responsible cause of Drake's injury. Accordingly, judgment was entered on the third-party claim,

> "... that the defendant, Treadwell Construction Company, and the third party defendant, United States of America, are joint tortfeasors and that the right of contribution exists in favor of the said defendant, Treadwell Construction Company, and against the United States of America, and the said Treadwell Construction Company may hereafter have judgment against the said United States of America for the amount of $180,000.00 which it has paid to the plaintiff, Joseph Drake, in excess of a sum of $90,000.00."

The United States has appealed, claiming, among other things, that this judgment on the third-party claim is invalid because of the immunity of the sovereign from suit.

We start with the basic rule that civil liability may not be imposed upon the sovereign except to the extent and in the manner to which it has consented. Seeking to avoid sovereign immunity, the third-party complaint alleges that the United States is liable under the Federal Tort Claims Act, 1946, 60 STAT. 812-47, as reorganized and codified 28 U. S. C. §§ 1346 (b), 1402 (b), 2402 and 2674. The complainant relies upon *United States v. Yellow Cab Co.*, 1951, 340 U.S. 543, where the Supreme Court decided that the Federal Tort Claims Act, in ad-

dition to authorizing an injured person to sue the United States, permits a tort-feasor, sued for negligent injury, to maintain a third-party claim for contribution against the United States as a joint tort-feasor.

The Tort Claims Act was the only statute involved in *Yellow Cab*. This case is different because the plaintiff is a federal employee and was injured in the course of his employment. Admittedly, he is covered by and entitled to compensation under the Federal Employees' Compensation Act as amended 5 U. S. C. Ch. 15. Section 7 (b) added to the Compensation Act by the Act of October 13 1949, 63 STAT. 861, 5 U. S. C. §757 (b), reads in part as follows:

> "(b) The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality on account of such injury or death, in any direct judicial proceedings, in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute. . . ."

On its face this subsection withdraws whatever consent the Tort Claims Act, considered alone, would otherwise give to the imposition of tort liability upon the United States on account of the injury of an employee covered by the Compensation Act, whether the claim is

asserted in the interest of the injured employee or anyone else. Contribution required of a joint tort-feasor toward the satisfaction of a covered government employee's judgment in tort seems as clearly within the language of Section 7 (b) as is total direct liability to the injured employee. *Christie v. Powder Power Tool Corp.*, D.D.C. 1954, 124 F. Supp. 693; *cf. Smither & Co. v. Coles*, D.C. Cir., 242 F.2d 220, *cert. denied*, 1957, 354 U. S. 914; *Underwood v. United States*, 10th Cir. 1953, 207 F.2d 862.

Similar reasoning has led the Court of Appeals for the Ninth Circuit to the conclusion that, where a government employee has been injured in a collision between two negligently operated ships, one of them operated by the United States, the normal maritime rule of contribution cannot be invoked to impose upon the United States a duty to share with the other negligent party the burden of making the injured employee whole. *United States v. Weyerhaeuser S. S. Co.*, 9th Cir. 1961, 294 F.2d 179.

Rulings under another federal compensation law are also relevant. The language of Section 7 (b) of the present statute is similar to the language of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 905, in making the workmen's compensation it provides a substitute for whatever tort liability the employer might otherwise have incurred on account of injury suffered by his employee. This court has expressed the view that Section 5 embodies a statutory scheme that precludes a tort-feasor, from which an employee has recovered for a negligent injury, from obtaining contribution from the injured person's employer as a joint tort-feasor. See *Brown v. American-Hawaiian*

S. S. Co., 1954, 211 F.2d 16, 18; *Crawford v. Pope & Talbot, Inc.*, 1953, 206 F.2d 784, 791-92; *cf. Pope & Talbot, Inc. v. Hawn*, 1953, 346 U. S. 406; *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 1952, 342 U. S. 282. We can find no consideration of public policy and nothing in the legislative history to justify construing the Federal Employees' Compensation Act as giving the United States a narrower immunity. See S. REP. No. 836, 2 U. S. Code Cong. Serv., 81st Cong, 1st Sess. 1949, 2125, 2135-36. Of course, the impropriety of allowing contribution as against the United States in a case arising under Section 7 (b) of the Federal Employees' Compensation Act is made even clearer by that Section's prohibition of any recovery on account of a government employee's injury "under any Federal tort liability statute".

Although the judgment on the third-party claim reads as an allowance of contribution between joint tortfeasors and nothing more than that, Treadwell makes an alternative argument that it properly prevailed on its third-party claim because of "an implied contract that the government will indemnify Treadwell". We do not reach the merits of this contractual theory.[1] For a contractual claim, just as one in tort, can be maintained against the United States only to the extent that the government has waived its sovereign immunity and consented to suit.

The generalized consent of the United States to be sued in contract appears in the Tucker Act, 28 U. S. C.

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1. For a recent discussion of a proposed broad construction of the Tucker Act in a different context, see our decision in *Richter and Levy v. United States*, No. 13,563, decided Nov. 16, 1961.

§ 1491. But the Tucker Act divides jurisdiction over claims against the United States, whether founded on express or implied contract, between the Court of Claims and the district courts. Only claims for less than $10,000 are cognizable in the district courts. 28 U. S. C. § 1346 (a) (2). We have here a claim for a liquidated sum far in excess of $10,000. Thus, if the Tucker Act covers such a claim as this—and we do not decide that it does—the controversy is not within the jurisdiction of a district court. *Cf. United States v. Sherwood*, 1941, 312 U. S. 584; *Sutcliffe Storage & Warehouse Co. v. United States*, 1st Cir. 1947, 162 F.2d 849.

In brief, if this action asserts a tort claim against the United States, Section 7 (b) of the Compensation Act bars the proceeding. If the claim is contractual the Tucker Act requires that it be brought in the Court of Claims.

The judgment will be reversed and the cause remanded for dismissal of the third-party claim for lack of jurisdiction.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.